

Commentary

*Editor's note: The world is getting smaller by the day. The state of the economy, the impact of climate change, and the effects of globalization demonstrate how interconnected our physical, political, and legal systems really are. Professor Harvey Jacobs encourages us to look across the pond to understand the similarities in regulatory takings jurisprudence between the United States and the European Union. The debate over regulatory takings continues to stir great interest among planners, lawyers, property owners, and government officials. We have invited several attorneys with very different perspectives to share their thoughts in *Planning & Environmental Law* later this year.*

An Alternative Perspective on United States–European Property Rights and Land Use Planning: Differences Without Any Substance

Harvey M. Jacobs

INTRODUCTION

Since the beginning of the 20th century, Americans have looked across the Atlantic for models of what are now known as sustainable cities and landscapes. In the early and mid-20th century England served as a model with its greenbelts and new towns; from the mid-century forward the focus was on Scandinavian countries and their use of public authority to purchase urban fringe land and tightly control urban growth (e.g., Mandelker 1962, Strong 1979). Now the interest is in the creative application of environmental management principles to fashion sustainable urban and regional environments (Beatley 2000, Siy 2004, Faludi 2007).

A common and long-standing story in the planning literature sees the U.S. approach to land use planning and management as significantly different (even unique) from other developed countries, especially those in Western Europe (e.g., Delafons 1969, Cullingworth 1993, Alterman 1997). Reflecting its history, culture, and law, the U.S. approach is seen as less dependent on expert management, more protective of social values of individualism and local control, and more centered around the necessary integrity of private property vis-à-vis the role of the state as representative of the greater good (Alterman 1997, Ely 1992, Hamlin 2002).¹

In an award-winning article, Rachelle Alterman has argued that the United States is exceptional in the limits placed on government's regulatory role—the concept known as regulatory takings (Alterman 1997). In my own recent work, I argue that the systems of private property and land use planning in the United States and Europe have, functionally and traditionally, not been as disparate as has been commonly depicted, and that changing institutional and legal conditions in the United States and Europe are bringing them increasingly together—to the extent they have ever been apart (Jacobs 2008a, 2008b). This tendency for convergence is further reinforced by global property rights ini-

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1. Alexander (2006: 17–19) refers to the causal relationship of history and culture to law as “path dependency.”

The scope of the Takings Clause at the time it was incorporated into the U.S. Constitution was limited—it applied only to physical takings.

tiatives that explicitly seek to build on the ideal U.S. model (Deininger 2003, DeSoto 2000). This commentary extends this argument.

In particular, I explore Article 1, Protocol 1 of the European Convention of Human Rights and the increasing role of the European Court of Human Rights (ECHR) in national, and thus trans-European, land use planning processes via its management of the nation-state's position over private property. First, I provide a brief discussion of regulatory takings in the United States. Then I turn to a discussion of Article 1, Protocol 1, setting it within a broader discussion of European integration and treaties, the latter's treatment of private property, the nation-state's role in land use planning, and the role of the European Union itself. I close by suggesting that the nature of the ECHR's decisions intimate a situation where the United States and Europe are evolving toward differences without any substance.

REGULATORY TAKINGS IN THE UNITED STATES²

The American concept of regulatory takings speaks to the limits placed on government to engage in regulation of private property absent compensation to the landowner for regulation that is deemed to be too onerous (e.g., Bromley 1993, Fischel 1995, Alexander 2006). Put another way, the idea of regulatory takings is that government regulation that is deemed to demand too much from the individual property owner in the pursuit of a public purpose entitles that property owner to some form of compensation from the public.

Legally, the concept originates in the so-called Takings Clause of the Fifth Amendment of the Bill of Rights of the U.S. Constitution: "Nor shall private property be taken for public use, without just compensation." Based on this phrase,

government has the right to expropriate private property but only under two conditions, which must both be present at the same time. The expropriation (or takings) must be for a public use, and the individual property owner must be provided with just compensation.

The scope of the Takings Clause at the time it was incorporated into the U.S. Constitution was limited—it applied only to physical takings. Takings occurred when government expropriated private property for public purposes to build a road, a dam, or a school, for example. Takings did not occur from government regulation and its impacts; it was not designed to be about this, and it did not function in this way (Bosselman et al. 1973, Jacobs 1999).

From the time of the founding of the American colonies through the whole of the 19th century, regulatory takings did not exist in American jurisprudence or how American governments and individuals related to each other (Bosselman et al. 1973, Treanor 1995). When government regulated land use, it was free to do so for various reasons, and the individual, while he might be aggrieved and seriously burdened by the regulation, had little recourse.

This changed in the early part of the 20th century. This was a time of great change in the United States, with substantial immigration to America's eastern coastal cities as well as internal migration from rural to urban areas. In addition, there was substantial industrialization, much of it clustered in the same cities that were experiencing migration and immigration. The net result was a situation where the physical landscapes of America's urban areas were changing rapidly, and the conditions within these cities were often deteriorating seriously, especially in those areas where immigrants, migrants, and industry were clumped together. The response of some

of these cities was to pass regulations to manage public health and safety conditions. Out of these new spatial and economic conditions arose a concern about whether there were appropriate limits to government regulation.

At first, the answer was simply and definitively no. Early in the 20th century, the U.S. Supreme Court affirmed the right of government to regulate absent any obligation for compensation. In 1915, the Court concluded:

... we are dealing with one of the most essential powers of government, one that is the least limitable ... the imperative necessity for its existence precludes any limitation upon it ... if ... private interests are in the way they must yield to the good of the community. (*Hadacheck v. Sebastian* 239 U.S. 394 (1915): 410.)

The conditions of the period kept the issue before the courts; as they did, the U.S. Supreme Court defined a regulatory taking. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court issued its famous dictum defining the 20th century concept of regulatory takings. In examining the power of government to issue regulations that affect private property, the Court said: "The general rule ... is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking" (260 U.S. at 415 (emphasis added)). In other words, a regulation can be equivalent to a taking (physical expropriation) under the Fifth Amendment. Given the construction and logic of the Fifth Amendment, if a regulation is found to be equivalent to a physical taking (and assuming prima facie that the regulation is being developed for a public use), then government is obligated to provide the landowner with compensation.

2. This section draws heavily, in form and text, from two sections in Jacobs (2008b).

For a number of reasons, beginning around 1970, government at the federal, state, and local levels in the United States began to engage in more regulation, and this regulation imposed itself more strongly upon individuals and their property rights.

However, in the first two-thirds of the 20th century the new regulatory takings dictum established in *Pennsylvania Coal* proved to be more theory than practice. There were few instances of the government going “too far” (Kayden 2004). Broadly speaking, economic and social conditions were about development, not its restriction. This changed with the first Earth Day. For a number of reasons, beginning around 1970, government at the federal, state, and local levels in the United States began to engage in more regulation, and this regulation imposed itself more strongly upon individuals and their property rights.³ The limitations established in *Pennsylvania Coal*—the doctrine of regulatory takings—emerged as an important part of the legal, policy, and administrative discourse of the final third of the 20th century to the present.

Between 1978 and 1994, the Court agreed to review a number of cases in which it had the opportunity to revisit and refine its own, the government’s, and the individual’s understanding of the appropriate balance between acceptable and unacceptable regulation.⁴ The Court began to more clearly say when the “too-far” line articulated in *Pennsylvania Coal* had been crossed. One decision that received a great deal of attention was *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where the Court ruled that when all economically viable use has been taken by regulation, compensation is owed the landowner. But even here the Court allowed an “out” for government by conditioning an assessment of the regulation’s impact on state-based background principles of nuisance.

The policy outcome of these cases was ambiguous, however. As commonly understood by private property owners, their advocates, and government officials, regulation of land was still accept-

able, but a regulating body needed to be careful and precise in the formulation and administration of regulations (Roddewig and Duerksen 1989). The Court then left this inquiry for another decade.

In 2002, the U.S. Supreme Court returned its attention to the Takings Clause in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), a case involving a nearly three-year moratorium on development. Specifically, the question before the Court was whether the moratorium went “too far.” In a decision strongly favoring the government, the Court found that planning and regulation are normal and expected governmental functions and that the Court had no reason to interfere with regular planning activity (Kayden 2002). As Jerold Kayden (2004: 43–44) notes, the Court’s analysis and opinion:

... exhibits a genuine appreciation for land-use planning. ... Land-use regulations, says the Court, are “ubiquitous,” usually “impact property values in some tangential way,” and would become “a luxury few governments could afford” if automatic regulatory takings rules were widely applied. *Tahoe-Sierra* is a rude awakening for anyone who thought that the Court’s pendulum swung only in one direction.

In June 2005, the Court issued its closely watched decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). Pressed by property rights advocates, the Court agreed to clarify its thinking and guidance about the “public use” phrase in the Takings Clause, revisiting what was for some its controversial decision a half century earlier in *Berman v. Parker*, 348 U.S. 26 (1954). In *Kelo*, the city asserted its right to take private property with compensation for a public use, defined to be the con-

solidation of the land for distribution to another private owner in order to facilitate economic development in the city through new jobs and increased property tax revenues from the land. Unlike the earlier *Berman* case, the city did not even bring forth a pretense of classifying the property slated for taking as blighted. By a one-vote margin, the Court affirmed the city’s right to engage in this form of taking.

The *Kelo* case set off a firestorm of popular protest and legislative reactions in the states (Egan 2005, Jacobs 2008b). Nonetheless, the decision is interesting for what it says about regulatory takings in the United States. In 1922, the Court established the concept of regulatory takings with *Pennsylvania Coal*, but in practice, it seems that little in the way of actual governmental practice crosses this magically undefined line. In the 1980s and 1990s, the Court attempted to specify what this might mean in practice, but its recent decisions suggest that it may be giving up. “Too far” is a strong idea in theory, but like the Court’s decisions on pornography, it may be too difficult to specify in advance.⁵

ARTICLE 1, PROTOCOL 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention of Human Rights)⁶ was signed in Rome and adopted in November 1950. Its signatories included the then 10 countries of the Council of Europe: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. As part of its establishment, the European Court of Human Rights was created to supervise compliance with the Convention; the ECHR thus

3. Moss (1977) provides contemporary chronicling of this phenomenon.

4. Some of the most prominent cases include *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482

U.S. 304 (1987); *Nollan v. Calif. Coastal Comm’n*, 483 U.S. 825 (1987); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); and *Dolan v. City of Tigard* 512 U.S. 374 (1994).

5. For the Court’s reflections on pornography see *Jacobellis v. Ohio*, 378 US

184 (1964):196—“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .”.

6. See <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm>.

The 1957 Treaty of Rome, which formally established the European Economic Community, laid the groundwork for the current European Union.

functions as the high court for issues related to human rights and fundamental freedoms.⁷ Since its adoption, the Convention has been adopted by all 46 member states of the Council of Europe, which includes all 27 members of the European Union (Ploeger and Groetelaers 2007: 1424). Article 1, Protocol 1 of the Convention, adopted in March 1952, addresses the issue of property and its use:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.⁸

The implementation and interpretation of Protocol 1 is shaped by a set of related articles in the Convention, including most centrally the right to a fair trial (Article 6), the right to the protection of one's private life and home (Article 8), and the right to not be subject to discrimination (Article 14).⁹

The 1957 Treaty of Rome, which formally established the European Economic Community, laid the groundwork for the current European Union. Article 222 of the Treaty states: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." European legal scholars take note of this. Daniela Caruso (2004: 752) observes that "property is strangely singled out and portrayed as immune from Europeanisation . . . and this seems somewhat at odds with the growing impact of supranational adjudi-

cation upon States' property regimes." In a similar vein, Antonio Gambaro (1997: 489) notes that "Article 222 of the EEC Treaty raises a complete bar to the disciplining of real property at the European level . . ."

Caruso and Gambaro were writing in the lead-up to the 2005 European vote on a proposed European constitution (a vote which failed). That constitution carried over the structure of Article 222 from the 1957 Treaty. Article II-77 of the proposed European Constitution is titled "Right to Property" and has two parts addressing land and intellectual property. Section one on land-based property states:

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

Yet Article III-425 of the proposed constitution notes that "the Constitution shall in no way prejudice the rules in Member States governing the system of property ownership."

Overall, Caruso (2004: 753) finds herself surprised and perplexed by these formulations. "A quick look at the Constitutional Treaty," she says, "reveals a rather striking detail. The drafters, while making it clear that *intellectual* property becomes a subject for legitimate legislative action at the EU level, have restated the promise of non-interference with property in general" (emphasis in original). So, "in the draft Constitutional Treaty, property remains segregated and portrayed as something essentially different, somehow sever-

able from the project of integration" (Caruso 2004: 753-754).

In pondering where this leads, Gambaro decides that property will be isolated from the project of European integration. Caruso is less confident, but ultimately agrees with Gambaro's assessment that property will remain a national, rather than European, matter. But Gerwyn Griffiths (2003), whom Caruso draws upon for her analysis, is not so sure. He sees an irreconcilable conflict between the exceptionalism of property under the Treaty of Rome and the proposed European Constitution, the longer term process of European integration, and specifically the other broader legal principles guiding the integration project. As Griffiths sees it, the broader EU project will at some point come into conflict with residual national structures for the management of private property. At this point it will be necessary to both rethink and reinvent these structures, to Europeanize them. This brings us back to Article 1, Protocol 1 of the Convention.

Hendrik Ploeger and Daniëlle Groetelaers (2007) recently published an analysis of Article 1, Protocol 1 from the perspective of the case law of the ECHR.¹⁰ As they begin, they note two things:

- There has been a sharp increase in the number of cases brought before the court since 2000.
- In 2004 alone, cases covered a wide range of property matters (which in description will seem familiar to a U.S. audience), including allegations of a prolonged period of building prohibition, a prolonged period for suspension of building work, the irregular manner by which long-term leases were terminated, and the refusal of public authorities to return portions of expropriated property not used for the original expro-

7. For some general information, see http://en.wikipedia.org/wiki/Council_of_Europe, as well as the website of the court itself: <http://www.echr.coe.int/ECHR>.

8. See Ploeger and Groetelaers 2007: 1423-1424.

9. In particular, the text of Article 8 is important to note.

Article 8: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a demo-

cratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. <http://www.echr.coe.int>.

10. There is other, though limited, English language literature on this subject. Take note of, for example, Allen (2005) and Çoban (2004). For the purposes of this paper, I largely restrict myself to utilizing the recent analysis in Ploeger and Groetelaers (2007), supple-

mented by Groetelaers and Ploeger (2006), and Ploeger et al (2005).

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

priated purpose (Ploeger and Groetelaers 2007, 1425–1426).

It is in how the court decided these cases that we begin to see both the accuracy of Griffiths's prediction and the coming together of U.S. and European concepts of the relative rights of the individual vis-a-vis the state.

Ploeger and Groetelaers (2007: 1431) argue that “in general, the Court leaves the national authorities a wide ‘margin of appreciation’ to implement social and economic policies. Therefore, it will respect the judgment of the national legislature that the measure is in the general interest unless that is manifestly without reasonable foundation.” Yet, at the same time, while it starts from national law, the ECHR has developed a trans-European concept of property that is not solely dependent on national laws or definitions; it has “an autonomous meaning” (ibid: 1427).

In assessing the verity of a claim under Article 1, Protocol 1, the ECHR employs a five-part test:

1. Did the applicant have property in the sense of Article 1?
2. Was there interference with the peaceful enjoyment of the property?
3. Was the interference provided for by law?
4. Did the interference pursue the general interest?
5. Did the interference strike a fair balance? (Ploeger and Groetelaers 2007: 1427).

In working through these steps the court is concerned with determining if the applicant has a concrete economic interest and if the interest is negatively impacted by governmental action. As Ploeger et al. (2005: 7) note: “the concept of property developed by the European Court of Human Rights . . . considers property to be a collection of

lawful interests (‘a bundle of sticks’), with a pecuniary value . . .”. And while “deprivation of one’s possessions can be the actual expropriation of the physical constructions . . . Article 1 is also applicable if there is an economic loss or economic interests in one’s possessions at stake In short, we can say that Article 1 is applicable if an interference with one’s possessions has an economic impact on those possessions” (Groetelaers and Ploeger 2006: 13).

What is the implication of all this for the two principal foci of this commentary—whether there is a concept of regulatory takings emerging in Europe, and whether there is a trans-European concept of property management emerging?

Ploeger and his colleagues argue that “any involvement with the use of land, so any planning instrument, will constitute an ‘interference’ in the sense of Article 1” (Ploeger and Groetelaers 2007: 1436). It is not *if* planning instruments interfere, but rather *how* that interference impacts “the peaceful enjoyment of the property” and whether it strikes “a fair balance” of public and private needs and goals *in the context of the protections offered by Article 1, Protocol 1*. “The purpose of ECHR law is primarily that of protection against direct governmental intrusion of the private sphere” (Groetelaers and Ploeger 2006:16).

DIFFERENCES WITHOUT ANY SUBSTANCE?

In its form and structure, Article 1, Protocol 1 is neither surprising nor radical. The first paragraph setting out the guarantees for the individual follows from both Right 17 of the French Revolution’s Declaration of the Rights of Man and the U.S. Constitution’s Takings Clause.

- Article 1, Protocol 1 (1952)—“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

- Right 17 (1789)—“Property being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance.”
- Takings Clause (1791)—“Nor shall private property be taken for public use, without just compensation.”

All three statements recognize the existence of private property, but allow for its expropriation (“deprived,” the term used in both Article 1 and Right 17), when such is required “in the public interest and subject to the conditions provided for by law” (Article 1) or “when public necessity, certified by law, obviously requires it . . .” (Right 17).

A feature of Article 1 that distinguishes it from Right 17 and the Takings Clause is that Article 1 *does not* explicitly provide for “just compensation” (Right 17 and Takings Clause), and especially not “in advance” (Right 17). Further, Article 1, being written as it was in the mid-20th century, provides for an explicit recognition of an appropriate role for governmental action upon private property. “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

This recognition of a role for government—and a limitation upon the unfettered rights of the individual—is itself rooted in the Napoleonic Code of 1804 and how it draws from Roman law.¹¹

11. This paragraph and the following one draw from Jacobs 2008b: 59–60.

Under Swedish law, expropriation must be accompanied by compensation, and such compensation must reflect market value.

Two sets of authority are recognized with regard to property: *dominium* and *imperium*. According to Philip Booth, *dominium* represents “the exclusive right of the owner to the current beneficial use of his or her property and its future development” (Booth 2002: 155). Yet *imperium* stresses that “those individual rights nevertheless resided within an overall right of the state to govern, and by implication to intervene in the landowner’s right to property for the greater good of the state” (ibid).

The practical implication of the balancing of these rights has traditionally been understood as establishing an individual’s right against unreasonable expropriation by the state, but not as establishing any individual right vis-a-vis government regulation. As commonly understood and reported by scholars and practitioners, in Europe today there is still a hard line between the physical expropriation and regulation (Alterman 1997). What has not happened in Europe is something parallel to the U.S. Supreme Court’s *Pennsylvania Coal* regulatory takings decision in 1922. Or to put it another way, the situation in Europe is commonly understood to be parallel to the pre-1922 U.S. era, when regulation was “one of the most essential powers of government, one that is the least limitable,” and therefore “private interests . . . must yield to the good of the community” (*Hadacheck*, 239 U.S. 394, 410 (1915)).

According to Ploeger and Groetelaers, the decisions of the ECHR in its implementation and interpretation of Article 1, Protocol 1 seem to be challenging this common story (Ploeger and Groetelaers 2007: 1432–1436). They use three cases decided by the court to explore this issue; two are summarized here.

Sporrong and Lönnroth v. Sweden (1982) is the first case decided by the ECHR addressing the protections

offered by Article 1 (text of ECHR decisions can be found <http://cmiskp.echr.coe.int>). The plaintiffs’ two properties were subject to expropriation permits indicating the intent to expropriate by the city of Stockholm for 23 years and eight years respectively, and prohibition of construction for 25 and 12 years respectively. Under Swedish law, expropriation must be accompanied by compensation, and such compensation must reflect market value. However, a delay in expropriation is not a basis for compensatory damages. “Both applicants complained of the length of period during which these measures affecting their properties had been in force. In their view it was an unlawful interference with the right to peaceful enjoyment of their possession” (ibid: 1433). Specifically, the plaintiffs argued that the governmental actions “subjected the enjoyment and power to dispose of their properties to limitations that were excessive and did not give rise to any compensation,” and that they “lost the possibility to sell their properties at normal market prices” (ibid). The ECHR concluded that the plaintiffs, in fact, “bore an individual and excessive burden” and as a result there had been a violation of Article 1 (ibid: 1434).

In 2001, the ECHR decided a case about commercial development in Greece. The plaintiffs in *Pialopoulos and others v. Greece* intended to build a shopping center on land they owned; the municipality opposed the plan. After the plaintiffs applied for the permit, the municipality enacted a moratorium on building permits, and changed the land use designation of the land in question from building land to public parkland. The municipality indicated its intent for expropriation. Based on this statement, the plaintiffs applied for compensation, but over a 10-year period; the

municipality skirted its responsibility to compensate because of a lack of available funds. The plaintiffs argued that, since 1987, they had been deprived of the right to “enjoy, use or dispose of their property, and therefore their plot has been expropriated,” in violation of Article 1, and in violation of applicable provisions of the Greek constitution (ibid: 1436). The ECHR agreed. Specifically, the ECHR found there was “no reasonable balance struck between the public interest and the requirements for the protection of the applicants’ fundamental rights” (ibid).

Both of these cases originated in conflict over expropriation actions by local government. In fact, both were based on claims by the plaintiffs that the government had not fulfilled its own self-defined responsibilities under national law. However, both ultimately sought to use Article 1, Protocol 1 of the European Convention as a basis to advance their claims, either because they had been denied equity through national channels or because they saw a stronger basis for a claim under the trans-European protection of the Convention.

Ploeger and Groetelaers (2007) draw several conclusions from these cases. They suggest that “the use of land development tools and planning tools will find a boundary in the protection of fundamental right to property” and that “any involvement with the use of land, so any planning instrument, will constitute an ‘interference’ in the sense of Article 1” (ibid: 1436). Most significantly, they do not restrict their conclusion to situations only having to do with intended or planned expropriations.

Extending this conclusion, one can reasonably suggest that the differences that may have existed between the United States and Europe for much of the 20th century over regulatory takings

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may be becoming differences without substance. However, let me first clarify what is *not* changing.

For the most part, national law across Europe is not changing to articulate a concept of regulatory takings. Individual countries continue to have strong formal legal traditions reflecting both dominium and imperium (Jacobs 2006, 2008b). And if the proposed 2005 European Constitution is any indication of contemporary political and policy attitudes and practices, formal European law and treaties are not changing, either. For reasons of politics and policy, it appears that European law and treaties will continue to reflect the sentiments of the 1957 Treaty of Rome.

What is changing? The argument herein is that court-based law is changing, in particular the law of the ECHR. For some reason, individuals have begun actively turning to the Article 1, Protocol 1 and the venue of the ECHR and the potential relief it can offer as a means to challenge within-nation actions.¹² The result of these cases is to articulate a form of bottom-up, trans-European version of regulatory takings. Regulatory takings—the limit placed on the government’s right to regulate—is precisely the realm the ECHR is engaging, and its decisions have applicability across the European Union and the Council of Europe.

Beyond the law, though, what do the decisions of the ECHR mean for land use planning and policy practice in Europe? In the United States, I and others have argued that the impact of regulatory takings is more rhetorical than actual. Few governmental actions actually go “too far.” However, when the dictum of *Pennsylvania Coal* is combined with the strong cultural and historical position of property rights in the United States and the activ-

ism of politically conservative interest groups, the result is a policy climate that constrains governmental activity. The fear and threat of going “too far” shapes governmental decisions, rather than the actuality. In the United States, what shapes land use planning and policy is more the politics of property rights than the law.

In Europe the opposite may be true. In the 20th century, there has been no legal basis for regulatory takings, and no real cultural or historical support for the sentiments that underlie it. For a number of reasons, the fundamental and structural situation in Europe is changing significantly (Jacobs 2006, 2008b, drawing from Reid 2004 and Rifkin 2005). As it does, the legal basis for government regulation of private property is changing, and this commentary suggests it is getting stronger. Will this impact land use planning—and if so, how? Some preliminary data suggests that this practice will change, and the change will reflect a more cautious basis for land use planning (Jacobs 2008a). If this is true, regulatory takings in the United States and Europe will have differences without any substance.

CONCLUSION

Throughout the 20th century, and now in the 21st, an enduring question has been: To what extent can the United States and Europe (either individual countries or Europe as a whole) mutually learn from each other? In general, when the United States has looked across the ocean to learn from Europe, it found lessons from both the legal and planning realms. In the present period, the question of what the United States can learn from Europe on legal matters seems particularly problematic, given the recent orientation of U.S. courts to isolate themselves

from global legal discourse (Liptak 2008). In the planning realm there continues to be a great deal of interest in European experiences related to “smart growth,” regional planning, etc., and especially about the exercise of discretion, the utility of more centralized planning, and the function of planning in an environment where there is more “trust” for the role of government (e.g., Hamlin 2002, Siy 2004, Walljasper 2005).

A primary question raised herein is: What should Europe learn from the U.S. experience regarding regulatory takings as it moves (or appears to be moving) into a new era of “respect” for individual property rights vis-à-vis government?

I suggest there are principally two lessons:

1. Legal decisions that reinforce the power of the individual have little substantive impact on the planning processes and decision mechanisms of government itself. Why? Because legal decisions are often about extreme situations, and most of what government does does not fall into the category of extreme action.
2. The same legal decisions can act to “scare” government, to make it shy about approaching the planning and regulatory process. So, to use an American metaphor, these decisions make government “gun-shy”—cautious about what it will do to avoid legal challenges and their cost and negative publicity.

Until recently, the European relationship of government to individual has been analogous to the pre-1922 period in the United States, the *Hadacheck* period, where the legal consensus was that “the imperative necessity for its (regulation’s) existence

12. In Jacobs 2006 I note the rise of think-tanks and activists groups in Europe parallel to those in the United States which advocate, in the legal and policy realms, on property rights issues. Whether these European groups, like American groups, are directly or indirectly the reasons for the rise of these European Court cases is unknown (though a possibility worth investigating). What is known is that the European organizations concerned with property rights are actively networking and regularly convening (see, for example, note 114 in Jacobs 2008b).

From an American perspective, the question may be whether the cure that Europe is developing is worse than the disease, or is it actually a cure for the disease?

precludes any limitation upon it.” One interpretation of the current decisions of the ECHR is that Europe is moving (or beginning to move) away from the *Hadacheck* position.

Is that good or bad? There are reasons to both praise and criticize the ECHR for its decisions, though many of the cases which are discussed herein and in cited references do strike an American as exactly the reason why checks on governmental authority are needed.

If the ECHR and the European Union and national governments are going in the direction of the development of a legal-based concept of regulatory takings, then what might the United States’ experience of the last 85 years suggest?

- Within the structure of the European Union, there is a need to clarify the seemingly contradictory positions between the statements in the Treaty of Rome, Treaty of Maastricht, and the proposed EU Constitution about the national basis of managing land, and the human rights protection of property rights under the European Convention of Human Rights.
- There is a need to clarify the bases upon which individuals might make a regulatory takings claim. Will it be as in the United States, where diminution of all economic value can make an individual eligible (following from *Lucas*), or will it be as in the two highlighted ECHR cases when there is judged to be a too-extended time between declaration of expropriation by government and final action? What will constitute legitimate public planning activity? Put in European terms, it is necessary to clarify the respective place and role of dominium and imperium.
- Finally, there is a need to clarify liability. Who is liable when a regulatory taking is asserted and found to be legitimate—local governments, provincial governments, or the national government? The U.S. experience would suggest that if it is local governments, they will act more cautiously about regulatory actions. If liability falls upon a higher governmental unit, then local

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(and provincial) governments will feel freer to regulate in the public interest.

If I am correct in my characterization of events in Europe, its move toward articulating a doctrine of regulatory taking is momentous. American planners and legal scholars literally shudder at the possibility. American planners can feel severely constrained by both the cultural values about private property and legal strictures on regulating in the public interest. For many Americans, Europe has represented the alternative, a beacon on the hill, of how planning could and should be conceptualized and exercised. Yet there are good reasons for Europe to revisit its approach to regulation. Globalization, Europe’s future role as an economic and political power, and Europe’s serious commitment to human rights all require a reexamination of its long-standing approach to regulation and the right of the individual in relation to the state.

From an American perspective, the question may be whether the cure that Europe is developing is worse than the disease, or is it actually a cure for the disease? Continued dialogue about the experiences and expectations of the respective planning and legal systems is essential, especially if they are, in fact, co-evolving towards a similar point.

POSTSCRIPT

In the January 2009 issue of *Planning & Environmental Law*, Steven J. Eagle offered “reflections on private property, planning, and state power” (Eagle 2009: 3). Professor Eagle uses my presentation at the Bettman Symposium in April 2008, as well as my award-winning 1999 article published

in the *Journal of the American Planning Association*, to set up what he sees as the fundamental flaw with the arguments of many planners. He believes we have fallen prey to the “nirvana fallacy,” a “type of fallacious reasoning that compares the real-world, everyday operations of one institution with an idealized conception of another” (Eagle 2009: 4).

I am complimented that he finds my work so provocative. We have known each other for over a decade, have testified side by side (though on opposite sides of the issue) before Congress, and I have respect for his deep engagement with the area of land use law, land policy, and regulatory takings.

Let me be clear about where I agree with him. Professor Eagle faults me for playing too loose with Garret Hardin’s 1968 article “The Tragedy of the Commons” and its implications for planning practice (Hardin 1968). He argues that I misinterpret the article and do not understand its limitations (Eagle 2009: 4–6). In some ways I agree with him, but I would go even further than he does in his argument about the limitation of the Hardin article as a useful metaphor.

When I use Hardin in my teaching, I point out to students, as Eagle does, that Hardin is writing about a very particular land use arrangement (the open access commons), and that even among commons, this is only one of many types. However, I then note that Hardin’s scenario is premised on a set of assumptions which, when revealed, are highly questionable (e.g., that people will always act in a way that is shortsighted, greedy, self-interested, and noncommunicative with members of their own community). Even more importantly, I stress that the particular historical example Hardin uses—the English commons that existed from medieval times to the beginning of the industrial era—did not disappear through any misuse or tragedy. The English commons was a sustainable and enduring land use and social institution that only came to an end through an act of the British Parliament designed to create a labor pool

In fact, individuals acting rationally may well create a situation even they agree is not in their best interest.

for emerging factories. If the landless could not graze their animals on “free” or common land, then they were forced to work in factories to earn a living.

Despite the limitations of Hardin’s article and the story at its center, I stand by my use of it. The article (really the title) has become a central metaphor for the environmental movement in the United States and globally. When there is a resource management problem, someone at some time will identify it as “a tragedy of the commons.” And by this they mean to draw from one of Hardin’s key points, a point I repeat, that individual rationality does not equal social rationality. In fact, individuals acting rationally may well create a situation even they agree is not in their best interest.

Professor Eagle and I also fundamentally disagree. Let me clarify how and why, and then address the implications of this disagreement for the substance of my commentary. If I am (and I’m not sure I am) captured by a “nirvana fallacy,” then Professor Eagle is equally focused upon “government failure” (a concept analogous to market failure, but one that highlights the shortcomings of public sector action). Steeped as he is in the broad law and economics tradition, and the literature he draws upon is strongly from this perspective, a perspective loosely identified as “on the right,” he approaches public sector action skeptically, and individual action and markets benignly (Eagle 2009: 7–9). He is fully entitled to this perspective, as long as he and others understand just that—it is a perspective. As a perspective, it is open to debate, and we, as analysts, practitioners, and decision makers, can agree to disagree about assumptions, methods, data, analyses, and ultimately conclusions that we draw from this and any other perspective (including my own).

So what might all this mean for the transformations shaping property law and takings in Europe? I suspect that Professor Eagle would celebrate the demise of the centralized command and control approach in Europe, and the rise of a stronger property rights perspective. Along with this, I speculate that he

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(continued on page 12)

The future for Europe and the United States is not a choice between governments or markets; rather, it is a future where we debate the appropriate balance of what type of government and what type of market.

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would embrace the adoption of market mechanisms for resource management (e.g. transferable discharge and pollution rights) that Europe itself has so strongly embraced. He would probably see the institutional changes under way as positive.

I too see many of the changes as positive; at a minimum I see them as inevitable and unchangeable. Rather than judging or advocating for these changes, though, I am more interested in clear observation of them, and establishing a dialogue centered on a set of “what-ifs.” If the transformations I describe are ongoing, what lessons (good and bad) can Europe learn from the United States? If the transformations I describe unfold, what cautions might be heeded to avoid unintended consequences?

The future for Europe and the United States is not a choice between governments or markets; rather, it is a future where we debate the appropriate balance of what type of government and what type of market. Given recent circumstances, there is emerging a decided skepticism about markets. My debate with Professor Eagle is the appropriate balance in the relative influence of government and markets over land and property. Professor Eagle trusts the individual and is skeptical about public sector behavior in general and planning in particular. I understand being skeptical about governmental action (and motivations), but I am also strongly persuaded by the shortcomings of individual decision making. My reading of history and analyses of contemporary events suggests a necessary, essential, and central role for government in managing land and natural resources. However, this statement does not define a precise point that distinguishes legitimate from illegitimate land use regulation; this is still not clear. What I am clear about is that this point has varied over the more than 200 years since the American and French revolutions. What I do know is that any contemporary understanding of individual rights and illegitimate governmental regulation emerges through public dialogue, which finds expression in the media, in elected bodies, and in the decision of courts.